

1  
2  
3

4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA  
6 SAN JOSE DIVISION

7  
8 SER LAO,  
9 Plaintiff,  
10 v.  
11 H&M HENNES & MAURITZ, L.P.,  
12 Defendant.

Case No. [5:16-cv-00333-EJD](#)

**ORDER DENYING DEFENDANT'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

Re: Dkt. No. 47

13 I. INTRODUCTION

14 In this putative class action suit, Plaintiff Ser Lao ("Plaintiff" or "Lao") alleges his former  
15 employer, Defendant H&M Hennes & Maritz, L.P ("Defendant"), failed to provide accurate  
16 itemized wage statements and failed to pay minimum wage, overtime wages, and premium pay for  
17 missed meal and rest periods. Presently before the Court is Defendant's motion for partial  
18 summary judgment on Plaintiff's fourth cause of action for meal time violations and sixth cause of  
19 action for violation of California Labor Code §§201-203. Plaintiff agrees to dismiss the fourth  
20 cause of action without prejudice and opposes the motion as to the sixth cause of action ("waiting  
21 time claim"). At issue is whether the waiting time claim is barred by the doctrine of *res judicata*.  
22 The Court finds it appropriate to take the motion under submission for decision without oral  
23 argument pursuant to Civil Local Rule 7-1(b). Based upon all papers filed to date, Defendant's  
24 motion for partial summary judgment as to the waiting time claim is denied.

25 II. BACKGROUND

26 A. The Present Lawsuit – filed December 11, 2015

27 Defendant operates approximately 80 retail and outlet stores throughout California. On  
28 Case No.: [5:16-cv-00333-EJD](#)  
ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

1 approximately March 3, 2014, Plaintiff was hired as a department manager at Defendant's store  
2 located in Fresno, California. Approximately one year later, Plaintiff was promoted to Store  
3 Manager, the highest-ranking position at the store level. On September 24, 2015, Plaintiff was  
4 terminated.

5 Plaintiff seeks to represent a class that consists of “[a]ll non-exempt retail store employees  
6 who were employed by Defendant[] in the State of California at any time from December 11,  
7 2011, through the present.” Complaint at ¶17. Plaintiff also proposes a subclass of “all non-  
8 exempt retail store employees who were employed by Defendant[] in the State of California at any  
9 time from December 11, 2011, through the present . . . who received overtime pay and non-  
10 discretionary incentive pay, including without limitation, bonuses” (the “Regular Rate Sub-  
11 Class”), and another subclass of “all former employees who were employed by Defendant[] in the  
12 State of California at any time from December 11, 2012, through the present, whose employment  
13 was separated for any reason (voluntary or involuntary), including without limitation, resignation,  
14 termination, and/or lay-off, and upon their separation of employment received their final wages in  
15 the form of an ATM card” (the “ATM Card Class”). Id.

16 In the sixth cause of action, Plaintiff alleges a violation of Labor Code §§201-203.  
17 Plaintiff alleges that Defendant regularly and willfully failed and refused to pay all wages,  
18 including commissions, in a timely manner to employees upon discharge or resignation. More  
19 specifically, Defendant allegedly refused (a) to pay minimum and/or overtime wages for time  
20 spent by employees in security checks after having already clocked-out and/or (b) to pay meal and  
21 rest period premium pay for meal breaks that were shorter than 30 minutes as a result of having to  
22 undergo security checks. Id. at ¶57. Defendant also allegedly “failed and refused to pay overtime  
23 based on the correct regular rate taking into account all non-discretionary remuneration, including  
24 without limitation, monthly and quarterly profitability bonuses.” Id. Further, Plaintiff alleges that  
25 the ATM cards issued by Defendant to pay wages to employees who were discharged or resigned  
26 did not fully compensate the employees because the ATM cards were not usable at all locations,  
27 required fees for usage in some instances, and did not allow employees to access all of the monies  
28

1 contained on such cards. Id.

2 **B. Earlier-Filed Tran Class Action and Settlement**

3 In an earlier-filed wage and hour class action suit in state court, another employee,  
4 Suzanne Tran (“Tran”), sued Defendant for (1) “Failure to Pay Minimum Wage in Violation of  
5 Labor Code §§1194,1194.2, 1197 and Wage Order 14,” (2) “Failure to Compensate for All Hours  
6 Worked,” (3) “Failure to Make Payment within the Required Time: California Labor Code  
7 Sections 201, 202, 203”, and (4) Penalties Pursuant to Labor Code Section 2698-99. See  
8 Defendant’s Separate Statement of Undisputed Facts, Undisputed Fact (“UF”) 6. Tran brought  
9 suit to challenge Defendant’s alleged policy and practice of requiring non-exempt employees to  
10 work substantial amounts of time “off-the-clock and without pay, and failing to provide non-  
11 exempt employees with meal and rest periods.” Tran First Amended Complaint at ¶1. Tran  
12 alleged that she was required to perform numerous tasks both at the beginning and the end of her  
13 meal and rest breaks, and therefore she was not provided with 30 minutes of off-duty time for  
14 meal breaks or 10 minutes of off-duty time for rest breaks, nor paid one hour of wages for each  
15 meal/rest period violation. Id. With respect to the cause of action for violation of Labor Code  
16 Sections 201-203, Tran alleged that Defendant “failed to pay earned wages to Plaintiff . . . at the  
17 time those wages became due and payable.” Id. at ¶33. Tran alleged that Defendant “did not have  
18 a good faith basis for believing that Plaintiff was not entitled to overtime and/or meal and rest  
19 breaks.” Id. at ¶33. Tran alleged that Defendant “routinely classified store managers, including  
20 Tran, as salaried employees without ever conducting a good faith evaluation of whether its  
21 classification of the position as ‘exempt’ was correct.” Id. Tran alleged that these acts by  
22 Defendant violated Cal. Labor Code Sections 201 and 202. Accordingly, Tran sought recovery of  
23 waiting time penalties as provided under Labor Code Section 203. Id.

24 In May of 2015, the court certified the class (the “Tran Class”) as: “[a]ll individuals who  
25 are currently employed, or formerly have been employed by Defendant as non-exempt store  
26 management employee[sic] in the positions of supervisor, department manager, assistant manager  
27 and/or store manager and worked in Defendant’s stores in the State of California, at any time

28 Case No.: [5:16-cv-00333-EJD](#)

ORDER DENYING DEFENDANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT

1 within four years prior to the filing of the original complaint until resolution of this action.” UF 7.  
2 The named Plaintiff in the instant action, Lao, was a member of the Tran Class. UF 8.

3 On or about February 29, 2016, the state court granted preliminary approval of the Tran  
4 Class Action Settlement. UF9. With respect to the claims to be released, the Tran Settlement  
5 Agreement provided, “[a]s of the Effective Date, Settlement Class Members will release their  
6 Released Claims,” which were defined as:

7 all claims, up through the date of the Preliminary Approval, that  
8 were alleged in Plaintiff’s First Amended Complaint, or that could  
9 have been alleged based on the facts alleged in the First Amended  
10 Complaint including, but not limited to, claims for unpaid wages,  
meal and rest break premiums, waiting time penalties, and penalties  
for wage statement violations or other penalties under California  
Labor Code Section 2699, et seq.

11  
12 UF 10. The Notice of Settlement stated: “Upon Final Approval of the Settlement, each member  
13 of the Class who has not opted out of the settlement shall be deemed to have fully, finally, and  
14 forever released the Released Parties . . . from all Class Member Released Claims through the date  
15 of the final approval . . . All Class Members shall be bound by this release whether or not they  
16 return the Claim Form necessary to receive payment of their allocated settlement amount, unless  
17 they formally opt-out.” UF13.

18 Following preliminary approval, the claims administrator mailed a Notice of Settlement  
19 and Claim Form to class members, including Plaintiff Lao, the named Plaintiff in the instant  
20 action. UF 11. The Claim Form notified class members that the scope of the release was as  
21 follows: “all claims, up through February 29, 2016, that were alleged in Plaintiff’s First Amended  
22 Complaint, or that could have been alleged based on the facts alleged in the First Amended  
23 Complaint, including but not limited to, claims for unpaid wages, meal and rest break premiums,  
24 waiting time penalties, and penalties for wage statement violations or other penalties under  
25 California Labor Code Section 2699, et seq.” UF 14.

26 Plaintiff Lao admits that he received the Claim Form. UF 11, 12. He did not submit a  
27 completed Claim Form nor did he request to be excluded from the Tran settlement. UF 15. After  
28

1 receiving no objections to the Tran Class Action Settlement, the state court granted final approval  
2 and dismissed the Tran action. UF 16, 17. The state court order and judgment explicitly provided  
3 that “[t]he Class Members shall not sue, or file, initiate, or continue to prosecute any lawsuit,  
4 action, charge, complaint, administrative claim, or arbitration, or otherwise make a claim against  
5 any of the Released Parties as to claims released.” UF 18.

6 C. The Stipulation Regarding the Tran Class Action

7 In February of 2016, the parties to the instant action filed a stipulation with this Court  
8 regarding the impact of the Tran Class Action Settlement, which provided as follows:

9 the Tran class action settlement does not apply to Plaintiff and  
10 putative class members' claims for (1) unpaid wages/overtime under  
11 California Labor Code Sections 510, 558, 1194, 1197, and 11971.1  
12 that resulted from alleged security checks; (2) premium pay for  
13 missed meal and rest periods under California Labor Code Sections  
14 226.7 and 512, that resulted from alleged security checks; and (3)  
15 unpaid overtime under California Labor Code Sections 510, 558,  
16 1994, and 1197.1 that resulted from Defendant's alleged failure to  
17 include all non-discretionary items of compensation in the regular  
18 rate for the purposes of calculating overtime.

19 UF 20 (“Stipulation”).

20 III. STANDARDS

21 A motion for summary judgment should be granted if “there is no genuine dispute as to any  
22 material fact and the movant is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(a);  
23 Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). The moving party bears the  
24 initial burden of informing the Court of the basis for the motion and identifying the portions of the  
25 pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the  
26 absence of a triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct.  
27 2548, 91 L.Ed.2d 265 (1986).

28 If the moving party meets this initial burden, the burden shifts to the non-moving party to  
29 go beyond the pleadings and designate “specific facts showing that there is a genuine issue for  
30 trial.” Fed.R.Civ.P. 56(e); Celotex, 477 U.S. at 324. The court must regard as true the opposing  
31 party's evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324.

1 A genuine issue for trial exists if the non-moving party presents evidence from which a reasonable  
2 jury, viewing the evidence in the light most favorable to that party, could resolve the material issue  
3 in his or her favor. Anderson, 477 U.S. 242, 248-49, 106 S.Ct. 2505, 91 L.Ed.2d 202; Barlow v.  
4 Ground, 943 F.2d 1132, 1134-36 (9th Cir. 1991). Conversely, summary judgment must be  
5 granted where a party "fails to make a showing sufficient to establish the existence of an element  
6 essential to that party's case, on which that party will bear the burden of proof at trial." Celotex,  
7 477 U.S. at 322.

8 IV. DISCUSSION

9 Defendant contends that Plaintiff's waiting time claim is barred by the doctrine of *res*  
10 *judicata*, reasoning that both the Tran Class Action and Plaintiff's waiting time claim involve the  
11 same "primary right" protected by California Labor Code §201(a), which provides that "wages  
12 earned and unpaid at the time of discharge are due and payable immediately." Plaintiff argues that  
13 *res judicata* is not applicable because the factual predicate for Tran's Class Action is not  
14 "identical" to the factual predicate for his waiting time claim, and moreover that Defendant agreed  
15 the waiting time claim was outside the scope of the Tran Class Action Settlement by entering into  
16 the Stipulation.

17 "Claim preclusion in federal court can be based on a state court settlement." Howard v.  
18 America Online Inc., 208 F.3d 741, 748 (9th Cir. 2000). The preclusive effect of a state court  
19 judgment in federal court is determined by state preclusion law. See Id. Under California law,  
20 "[r]es *judicata*, or claim preclusion, prevents relitigation of the same cause of action in a second  
21 suit between the same parties or parties in privity with them." Mycogen Corp. v. Monsanto Co.,  
22 28 Cal.4th 888, 896 (2002). Claim preclusion applies when three requirements are met: (1) the  
23 prior proceeding resulted in a final judgment on the merits; (2) the present action is on the same  
24 cause of action as the prior proceeding; and (3) the party to be precluded was a party or in privity  
25 with a party to the prior proceeding. Boeken v. Philip Morris USA, Inc., 48 Cal.4th 788, 797  
26 (2010) (citations omitted). "[I]n determining whether a second complaint states a new cause of  
27 action, California courts apply the primary rights theory, under which the invasion of one primary  
28

1 right gives rise to a single cause of action.” Eichman v. Fotomat Corp., 759 F.2d 1434, 1438 (9th  
2 Cir. 1985) (citing Slater v. Blackwood, 15 Cal.3d 791, 795 (1975)). “Under California law, the  
3 claim arises from the harm suffered, as opposed to the particular theory of the litigant. Even when  
4 multiple legal theories for recovery exist, one injury gives rise to only claim for relief.” Id.; see also  
5 Bato v. Laboratory Corporation of America Holdings, No. 09-04671 MMM, 2010 WL  
6 11459908 (C.D. Cal. Feb. 8, 2010) (denial of meal and rests breaks is a single harm for purposes  
7 of primary right doctrine and precludes plaintiff from recovering civil penalties under both PAGA  
8 §226.7(a) and §226.7(b)); Tran v. Le French Baker, Inc., No. 94-0482 VRW, 1995 WL 374342  
9 (N.D. Cal. June 14, 1995) (plaintiff cannot split a cause of action by relitigating the same set of  
10 facts for a different form of relief).

11 Citing Villacres v. ABM Indus. Inc., 189 Cal.App.4th 562 (2010), Defendant contends that  
12 Plaintiff’s “primary right” under Labor Code §203, to wages earned and unpaid at the time of  
13 discharge, was fully redressed in the Tran Class Action and therefore Plaintiff is barred from  
14 asserting his waiting time claim. The Villacres case, however, provides more support for  
15 Plaintiff’s position than Defendant’s. There, in an earlier class action, employees sued their  
16 employer for failure to pay overtime compensation and failure to pay wages for a split shift in  
17 violation of the Labor Code and UCL. The case settled. Two days later, the plaintiff, a member  
18 of the prior class, filed the Villacres action against the same defendant seeking civil penalties  
19 under PAGA. The defendant employer argued that the “primary rights” theory “treats all wage-  
20 related Labor Code violations and PAGA penalties as a single cause of action,” and that plaintiff’s  
21 second suit for PAGA penalties was barred by *res judicata*. Id. at 581. In response, the plaintiff  
22 argued that every Labor Code violation and PAGA penalty “involves a separate primary right.”  
23 Id. Although the Villacres decision included a lengthy discussion of the “primary right” theory,  
24 the court ultimately determined that it need not decide which parties’ definition of a primary right  
25 was correct because “[t]he disposition in this case does not turn on such broad propositions.” Id.  
26 Instead, the Villacres court focused on the specific circumstances of the case and determined that  
27 *res judicata* did not apply because: plaintiff’s PAGA claims could have been and should have  
28 Case No.: 5:16-cv-00333-EJD  
ORDER DENYING DEFENDANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT

1 been raised in the prior action; plaintiff chose not to object to the settlement, not to intervene and  
2 not to opt out of the settlement; plaintiff instead remained silent, stayed in the class and accepted  
3 the benefits of the settlement; and the settlement agreement in the prior suit released plaintiff's  
4 PAGA claims.

5 Like the Villacres court, this Court need not decide the scope of a primary right because  
6 the specific circumstances of this case, namely the scope of the Tran Class Action Settlement and  
7 release, prove dispositive. In an analogous case, Mata v. Manpower Inc., No. 14-3787-LHK, 2016  
8 WL 948997 (N.D. Cal. March 14, 2016), defendant Manpower Inc. argued that certain claims  
9 were barred by *res judicata* because of a prior class action settlement involving the same claims.  
10 In analyzing the second *res judicata* factor (whether the present action is on the same causes of  
11 action as the prior action), the court found that the prior class action complaint and the complaint  
12 in the pending action were not the same. Although both complaints recited claims under  
13 California Labor Code §203, the Labor Code Private Attorneys General Act of 2004 ("PAGA")  
14 and California's Unfair Competition Law ("UCL"), the causes of action in the complaints were  
15 not the same because: the prior class action complaint was "predicated upon the late mailing of  
16 paychecks," whereas the pending complaint "alleged failure to pay any wages whatsoever for  
17 certain hours worked." Mata, 2016 WL 948997 at 7. Further, based upon Manpower's  
18 representations, the court found that the release in the prior class action complaint was only  
19 intended to encompass claims based on untimely receipt of paychecks, not claims based on a  
20 complete failure to pay. Id. Because of the differences in the causes of action (and differences in  
21 the parties in the proceedings), the court held that *res judicata* did not bar the claims in the  
22 pending action. Id.

23 Similar to Mata, although the Tran Class Action and Plaintiff's instant action both involve  
24 a Labor Code waiting time cause of action<sup>1</sup>, the causes of action are not based upon the same  
25

---

26 <sup>1</sup> Compare Tran FAC at ¶33 ("Defendants failed to pay earned wages to [Tran]. . . at the time  
27 those wages became due and payable . . . . Thus Defendants violated Cal. Labor Sections 201 and  
202. Accordingly, [Tran] seeks recover of waiting time penalties as provided under Labor Code  
Section 203."), with Lao Complaint at ¶¶57-59 ("As a pattern and practice Defendants regularly  
Case No.: 5:16-cv-00333-EJD

1 underlying facts. The Tran Class Action was predicated on Defendant's alleged failure to provide  
2 meal and rest periods. Tran First Amended Complaint at ¶1. Tran alleged that she was required to  
3 perform numerous tasks both at the beginning and the end of her meal and rest breaks, and  
4 therefore she was not provided with 30 minutes of off-duty time for meal breaks or 10 minutes of  
5 off-duty time for rest breaks, nor paid one hour of wages for each meal/rest period violation. The  
6 Tran Class Action did not include allegations regarding security checks, unpaid wages based on an  
7 incorrect regular rate of pay or ATM cards, which are alleged in the instant action.

8 Moreover, the scope of the release in the Tran Class Action Settlement was tailored to the  
9 factual allegations in that complaint to encompass "all claims . . . that were alleged . . . or that  
10 could have been alleged based on the facts alleged in the First Amended Complaint. . . ." UF 10.  
11 The Claim Form similarly notified the class members that the Tran Class Action Settlement  
12 released "all claims, up through February 29, 2016, that were alleged in Plaintiff's First Amended  
13 Complaint, or that could have been alleged based on the facts alleged in the First Amended  
14 Complaint." UF 14. Because Tran's First Amended Complaint did not include factual allegations  
15 regarding security checks or ATM cards, the resulting Tran Class Action Settlement and judgment  
16 do not preclude Plaintiff's waiting time claim in this case based upon those allegations. The  
17 parties' Stipulation in the instant action is consistent with this result. Although the Stipulation  
18 does not expressly reference the waiting time claim, it states that the Tran Class Action Settlement  
19 does not apply to various claims that "resulted from alleged security checks." UF 20.

20 Defendant nevertheless contends that an employee is only entitled to a single waiting time  
21 penalty, regardless of the manner in which the employer willfully fails to pay wages due to an  
22 employee. Although it may be true that a plaintiff is not entitled to more than one waiting time

---

23 and willfully failed and refused to pay all wages (including commissions) due and earned to  
24 discharged employees at the time of their termination, or within 72 hours of employees who quit  
25 and/or have resigned, or at the time of termination for those employees who gave 72 hours' notice.  
26 . . . As such, Defendants had a uniform corporate pattern and practice and procedure regarding the  
27 above practices in violation of California Labor Code §§201-203. . . . [which] creates an  
entitlement to recovery by [Lao] . . . for the unpaid balance of the full amount of damages owed,  
including interest thereon, penalties, attorneys' fees, and costs of suit according to the mandate of  
California Labor Code and 218.5." ).

28 Case No.: [5:16-cv-00333-EJD](#)

ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

1 penalty (see Reyes v. CVS Pharmacy, No. 14-964 MJ, 2016 (E.D. Cal. June 29, 2016), this  
2 presents a potential damages calculation issue, not a bar to Plaintiff's waiting time claim because  
3 he did not opt in to recover a waiting time penalty as part of the Tran Class Action Settlement.

4 **V. CONCLUSION**

5 For the reasons set forth above, Defendant's motion for partial summary judgment on the  
6 waiting time claim is DENIED. With respect to the fourth cause of action, Plaintiff offers to  
7 dismiss the claim without prejudice. Defendant, however, requests that the Court dismiss the  
8 fourth cause of action with prejudice. In light of Defendant's evidence that Plaintiff never had to  
9 take a meal period shorter than thirty minutes due to a security check and Plaintiff's tacit  
10 admission that he lacks sufficient evidence to raise a triable issue on the fourth cause of action, the  
11 Court DISMISSES the fourth cause of action WITH PREJUDICE.

12  
13 **IT IS SO ORDERED.**

14 Dated: October 25, 2017



15  
16 EDWARD J. DAVILA  
17 United States District Judge  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28